IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No.743 of 2006

For Approval and Signature:

HONOURABLE MR. JUSTICE BANKIM N. MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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SHAMJIBHAI VIRJIBHAI GOHEL & ORS. - Petitioners
Versus
THE STATE OF GUJARAT & ANR. - Respondents

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Appearance :
MR RC KAKKAD for Petitioners.
MR KC SHAH, APP for Respondent No.1.
MR PS CHAMPANERI for Respondent No.2.

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CORAM : HONOURABLE MR.JUSTICE BANKIM N. MEHTA

Date : 29/11/2007

ORAL JUDGMENT

1. The petitioners have filed this application under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 and have challenged the judgment and order dated 19th October 2006 passed by the learned 3rd Additional Sessions Judge, Veraval, in Criminal Revision

Application No.42 of 2006 whereby the judgment and order dated 10th March 2006 passed by the learned Judicial Magistrate First Class, Veraval, in Criminal Case No.1100 of 2005 has been confirmed.

2. Respondent No.2-original complainant filed a complaint under Section 138 of the Negotiable Instruments Act in the Court of learned Judicial Magistrate First Class, Veraval, and it was registered as Criminal Case No.1100 of 2005. The learned Magistrate issued process against the petitioners-accused. Pursuant to that, the accused appeared in the Court and gave application, Exhibit 6, to recall the order of process and to drop the proceedings against them. The trial Court, after hearing the parties, discharged the original accused Nos.3 to 5 from the proceedings.

3. Being aggrieved by the said decision, the petitioners preferred Criminal Revision Application No.42 of 2006 before the Sessions Court, Veraval. The accused, who were not discharged, also preferred Criminal Revision Application against the impugned order. After hearing the parties, the learned 3rd Additional Sessions Judge, Veraval, by his judgment and order dated 19th October 2006, allowed the Revision Application and set aside the order passed by the trial Court below Exhibit 6 and directed the lower trial Court to proceed against the accused in accordance with law.

4. Being aggrieved by the said decision, the petitioners-original accused Nos.3 to 5 have preferred this Revision Application.

5. Mr.R.C.Kakkad, learned advocate for the petitioners, and Mr.P.S.Champaneri, learned advocate for the respondent No.2-complainant, were heard yesterday, i.e. on 28th November 2007. Today, this Court has heard Mr.K.C.Shah, learned Additional Public Prosecutor for the respondent No.1-State.

6. It appears from the copy of the complaint filed before the Court of learned Magistrate that the respondent No.2-original complainant was doing business of fishing and the petitioners are running business of sale and purchase of fish in the name of "*Balihari Cold Storage*". The petitioners purchased fish from the respondent-complainant on credit and Rs.6 Lakhs remained due and payable by the petitioners for the purchase of fish. Therefore, the petitioners allegedly gave a cheque of Rs.6 Lakhs drawn on State Bank of Saurashtra, Veraval Branch, for such outstanding amount. The cheque was dishonoured by the bank with endorsement of "*insufficient funds*". Therefore, the respondent No.2-complainant gave notice as provided under the provisions of Negotiable Instruments Act to the petitioners-accused. Despite notice, the petitioners-accused did not pay the amount.

Therefore, the complaint came to be filed for the offence punishable under Section 138 of the Negotiable Instruments Act.

7. After recording the statement of the complainant on oath, the learned Judicial Magistrate First Class passed the order to issue process against the petitioners. Thereafter, the petitioners moved application, Exhibit 6, to recall the order and to drop the proceedings. The learned Judicial Magistrate First Class dropped the proceedings against the petitioners. Thereafter, First Revisional Court set aside the order and, therefore, present Revision Application has been filed.

8. Mr.Champaneri, learned advocate for the respondent No.2, relied upon the decisions of the Supreme Court in the cases of *Adalat Prasad vs. Rooplal Jindal & Ors., AIR 2004 SC 4674* and *Subramanium Sethuraman vs. State of Maharashtra & Anr., AIR 2004 SC 4711.* In the case of *Adalat Prasad (supra),* the Supreme Court has overruled its earlier decision in the case of *K.M.Mathew vs. State of Kerala, AIR 1992 SC 2206* and held as under:

> *14. But after taking cognizance of the complaint and examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under section 204 of the Code. Therefore what is necessary or a condition precedent for issuing process under section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under section 204 of the Code. In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only*

a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code. It is true as held by this Court in Mathew's case before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under sections 200 and 202, and the only stage of dismissal of the complaint arises under section 203 of the Code at which stage the accused has no role to play therefore the question of the accused on receipt of summons approaching the Court and making an application for dismissal of the complaint under section 203 of the Code for a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage.

15. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that is not by invoking section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal Courts, the remedy lies in invoking Section 482 of Code."

In the case of *Subramanium Sethuraman (supra),* the Supreme Court in paragraph 17 has held as under:

"17. As observed by us in Adalat Prasad's case the only remedy available to an aggrieved accused to challenge an order in an interlocutory stage is the extraordinary remedy under Section 482 of the Code and not by way of an application to recall the summons or to seek discharge which is not contemplated in the trial of a summons case."

9. It is clear that the learned trial Judge committed error in recalling the process issued against the petitioners and the first revisional Court was justified in setting aside order. Therefore, the first revisional Court has not committed any error in exercising jurisdiction vested in it. The learned advocate for the petitioners has failed to point out that the order under challenge is perverse, erroneous or without jurisdiction.

In the result, the Revision Application fails and is dismissed. The judgment and order dated 19th October 2006 passed by the learned 3rd Additional Sessions Judge, Veraval, in Criminal Revision Application No.42 of 2006 is hereby confirmed. Rule is discharged.

[Bankim N. Mehta, J.]

Rajendra